IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Henry W. Crumrine et al.,
Plaintiffs in Error,
vs.
United States of America,
Defendant in Error.

Roy W. Canaga et al.,
Plaintiffs in Error,
vs.
United States of America,
Defendant in Error.

BRIEF OF PLAINTIFFS IN ERROR.

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STATEMENT OF CASE.

This case reaches the court upon a writ of error to the United States District Court, for the Southern District of California, Southern Division, Honorable Benjamin F. Bledsoe, judge.

The defendants Henry W. Crumrine, William J. Fannon, Clyde H. Isrig, O. T. LeFever and A. N. Miller were indicted under Indictment No. 2033 Crim., and the defendant Roy W. Canaga, was indicted under Indictment No. 2047, Crim. The two cases were consolidated for trial ad tried together, and a verdict of guilty rendered against all said five defendants. Thereafter two cases were consolidated by stipulation [Tr. p. 39] and approval of court for the purpose of this appeal. Reference herein made to the "Indictment" will therefore be intended to apply to the indictments in both cases. Reference herein made to the defendant will therefore be intended to apply to all defendants under both cases so consolidated.

The defendants herein, and plaintiffs in error, each for himself, interposed a demurrer to the indictment [Tr. p. 28] wherein they objected to its sufficiency upon the ground that said indictment failed to state facts sufficient to constitute a punishable offense, or any offense, or crime against the laws or Constitution of the United States of America.

The Act of Congress upon which the indictment and the prosecution thereunder is based is known as the "Lever Act," "An act to provide further for the national security and defense by encouraging production, conserving the supply, and controlling the distribution of food products and fuel." (40 Statutes at Large, 277.) Act found U. S. Compiled Statutes 1918, Compiled Statutes Annotated, Supplement, 1919,

section 3115 ⅛ ff, and upon section 4 thereof of said act as amended Oct. 22, 1919 (41 Statutes at Large 298). The act as amended reads:

(Sec. 4.) "It is hereby made unlawful for any person willfully to destroy any necessaries for the purpose of enhancing the price or restricting the supply thereof; knowingly to commit waste, or willfully to permit preventable deterioration of any necessaries in or in connection with their production, manufacture, or distribution; to hoard, as defined in Sec. 6 of this act, any necessaries; to monopolize or attempt to monopolize, either locally or generally, any necessaries; to engage in any discrimatory and unfair, or any deceptive or wasteful practice or device; or to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries; to conspire, combine, agree, or arrange with any other person (a) to limit the facilities for transporting, producing, harvesting, manufacturing, supplying, storing or dealing in any necessaries; (b) to restrict the supply of any necessaries; (c) to restrict distribution of any necessaries; (d) to prevent, limit or lessen the manufacture or production of any necessaries in order to enhance the price thereof; or (e) to exact excessive prices for any necessaries, or to aid or abet the doing of any act made unlawful by this section. Any person violating any of the provisions of this section upon conviction thereof shall be fined not exceeding $5000.00, or be imprisoned for not more than two years, or both; Provided, that this section shall not apply to any farmer, gardner, horticul-

turist, vineyardist, planter, ranchman, dairyman, stock man or other agriculturist with respect to the farm products produced or raised upon land owned, leased or cultivated by him; Provided, further, that nothing in this act shall be construed to forbid or make unlawful collective bargaining by the co-operative association or other association of farmers, dairyman, gardeners or other farm products with respect to the farm products produced or raised by its members upon land owned, leased or cultivated by them.

And

Section 9: "That any person who conspires, combines, agrees or arranges with any other person (a) to limit the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any necessaries; (b) to restrict the supply of any necessaries; (c) to restrict the distribution of any necessaries; (d) to prevent, limit, or lessen the manufacture or production of any necessaries in order to enhance the price thereof shall, upon conviction thereof, be fined not exceeding $10,000.00 or be imprisoned for more than two years, or both."

The parts of this act of which we are concerned are:

"It is hereby made unlawful for any person * * * to conspire, combine, agree or arrange to with any other person (a) to limit the facilities for transporting * * * supplying and storing * * * in any necessaries. * * * Provided, That this section shall not apply to any farmer,

gardener, horticulturist, vineyardist, planter, ranchman, dairyman, stockman or other agriculturist, with respect to the farm products produced or raised upon land owned, leased or cultivated by him; Provided, further, That nothing in this act shall be construed to forbid or make unlawful collective bargaining by the co-operative association or other association of farmers, dairymen, gardeners, or other producers of farm products with respect to the farm products produced or raised by its members upon land owned, leased or cultivated by them."

The indictment in this case purports to charge the defendants with a crime against the United States under said act, and the defendants were arraigned, tried by a jury, convicted and sentenced thereunder. The defendants contend by their demurrer [Tr. p. 28] and by their objection to introduction of any evidence by the prosecution under the indictment [Tr. p. 30], by their motion for new trial [Tr. p. 33], and by their motion in arrest of judgment [Tr. p. 32] that the indictment does not state any offense against the laws of the United States of America, and that the act known as the "Lever Act" under which the indictment was drawn is unconstitutional and void.

Following the return of the verdict motions were duly made for a new trial and in arrest of judgment, and same were denied. [Tr. p. 12.] The defendants were sentenced and judgment of court was that each defendant pay unto the United States of America a fine in the sum of $1,000.00 and to stand committed to the Los Angeles county jail until said fine is paid.

In due course the defendants, each of them jointly sought and obtained a writ of error, and they are now before this Honorable Court on the consolidated bill of exceptions, assignment of errors and transcript of the record.

Specifications of Error Relied Upon by Plaintiffs in Error.

I.

The indictment fails to contain facts sufficient to constitute a punishable offense, and that the court erred in overruling the demurrer interposed to the indictment, because said act under which the indictment was drawn is unconstitutional and void, and contrary to the Fifth and Sixth Amendments to the Constitution of the United States of America.

(a) That said act is vague, indefinite and uncertain.

(b) That it fixed no immutable standard of guilt.

(c) That it did not inform the defendants of its violation and the nature of the accusation against them, nor as to what acts would constitute such violation.

(d) That said act fails to define a crime, but merely declared any person who should commit any unjust or unreasonable act should be guilty of a felony, and that if enforced it would deprive citizens of the United States of their property and liberty without due or any process of law.

(e) That Congress exceeded its powers in enacting such law under powers granted it by article I, Par. 11, 12, 13, 18 of Sec. 8 of the Constitution.

II.

Assignments of error Nos. 2, 3, 4, 5 and 6 contained in transcript page 21, 22, involve the same questions and points discussed in assignment No. 1.

ARGUMENT.

The principal ground relied on for reversal is that the act known as the Lever Act, or especially that part of said act in which we are concerned and reads:

> "(a) To limit the facilities for transporting * * * supplying, storing, or dealing in any necessaries, and also, provided, that this section shall not apply to any farmer, gardener, horticulturist, vineyardist, planter, ranchman, dairyman, stockman, or other agriculturist, with respect to the farm products produced or raised upon land owned, leased, or cultivated by him; provided further that nothing in this act shall be construed to forbid or make unlawful collective bargaining by the co-operative association or other association of farmers, dairymen, gardeners, or other producers of farm products with respect to the farm products produced or raised by its members upon land owned, leased or cultivated by them"

is unconstitutional and void. Because the act is unconstitutional the demurrer interposed to the indictment

and also the Demurrer *Gora tenus* to the introduction of any evidence under the indictment should be sustained.

The defendants are charged in the indictment with well knowing the enactment of the "Lever Act" and with such knowledge "began, instituted, agitated and spread a strike among the switchmen and other men who were engaged on the freight trains of the said railroad companies * * * and bceause of said conduct on the part of said defendants, a strike of switchmen and yardmen of said railroads in said district was declared, and the men employed by said railroad companies to handle the said freight trains as such yardmen and switchmen refused to do and perform their duties as such employees of said railroad companies, and because of said strike and refusal of said yardmen and switchmen to perform their duties the said railroad companies were totally unable to transport or supply the said foodstuffs, feeds, and fuel oil; and by such action of the said defendants the transportation of such foodstuffs, feeds, and fuel oil was then and there prevented and the facilities for transporting the same were thereby limited," etc.

It is a fundamental principle of law that the right exists for men or any organization of men, when conditions of wage earners warrant it, to quit their work either singly or collectively and to encourage others to join with them to make a strike effective. It is the inherent and constitutional right that every citizen of the United States has to work or quit work as he

chooses. In Iron Moulders Union v. Allis-Chalmers Co., 166 Fed. 45, the court said:

> "To organize for the purpose of securing improvement in the terms and conditions of labor, and to quit work and to threaten to quit work as means of compelling or attempting to compel employers to accede to their demands for better terms and conditions, are rights of workmen so well and so thoroughly established in the law (Thomas v. Rid. Co. (C. C.) 62 Fed. 803; Arthur v. Oakes, 63 Fed. 320, 11 C. C. A. 209, 25 L. R. A. 414; Wabash Rld. Co. v. Hannahan (C. C.) 121 Fed. 563), that nothing remains except to determine in successive cases as they arise whether the means used in the endeavor to make the strike effective are lawful or unlawful."

Also same rule held:

U. S. v. Norris, 255 Fed. 435;

Duplex Press Co. v. Darring, 247 Fed. 198, affirmed in 252 Fed. 722;

Puget Sound, etc. v. Whitney, 243 Fed. 945.

And recognized in:

Hickman Coal Co. v. Mitchell, 245 U. S. 229, 62 L. Ed. 260;

Wabash R. R. Co. v. Hannahan, 121 Fed. 563.

The indictment does not charge the defendants in doing any unlawful act except that the strike was in violation of the paragraph in which we are concerned—a part of the Lever Act. And it is nowhere shown that there was any force, violence, coercion or effort made

by defendants to interfere with their employers' rights in any manner, or to limit their facilities for transporting their many hundred carloads of foodstuffs as alleged in the indictment.

Except for the emergency of war there would be no question whatsoever that such an act would be unconstitutional and a clear interference with inherent rights of citizens of the United States and the punishment repugnant to the fifth amendment to the Constitution of the United States, which requires that "No person shall be deprived of his liberty as punishment for crime without due process of law."

This rule is well stated in Adair v. United States, 208 U. S. 161, 52 L. Ed. 436:

> "While, as already suggested, the right of liberty and property guaranteed by the Constitution against deprivation without due process of law is subject to such reasonable restraints as the common good or the general welfare may require, it is not within the functions of government—at least, in the absence of contract between the parties—to compel any person, in the course of his business and against his will, to accept or retain the personal services of another, or to compel any person, against his will, to perform personal services for another. The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. So the right of the employee to quit the

service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employee."

The Lever Act is an "emergency war measure." When the defendants ceased work and the time which they are charged with the alleged offense the war was actually over, though perhaps not technically so, and the use and purpose for which the measure was intended was at an end. As war ceased to exist in fact when the armistice was signed and announced to Congress by the President, the termination thereby of Act August 10, 1917. (Comp. St. Annotated Sup. 1919, paragraphs 3115⅛ E., 3115⅛ K.K., 3115⅛ L. and 3115⅛ R.)

A.

That said act is so vague, indefinite and uncertain, that no immutable standard of guilt is fixed. It fixes no definite or certain rule by which human conduct can be uniformly governed, and leaves such standard to the variance of the different courts and juries; that it does not inform the defendants of the nature of the cause of the accusation against them, or what acts constitute such violation; that said act fails to define a crime, but merely declares any person who should commit any unjust or unreasonable act should be guilty of a felony, and that if enforced it would deprive citizens of the United States of their property and liberty "without due process of law."

The act in question is repugnant to the Fifth and Sixth Amendments of the Federal Constitution. The clause of the Fifth Amendment relied on is "No person shall * * * be deprived of life, liberty or property without due process of law," and the Sixth Amendment is "In all criminal prosecutions the accused shall enjoy the right * * * to be informed of the nature and cause of the accusation." Under these clauses of the Constitution the sections of the Lever Act are so indefinite, vague and uncertain that the prosecution under either of them would deprive the defendants of their liberty without due process of law. A criminal statute, to be valid, must be so clearly and definitely expressed that an ordinary man can determine in advance whether his contemplated acts are within or without the law. In this case the defendants "went on strike" depending upon their inherent and constitutional right to do so. Not one of the defendants, however intelligent he might be, in reading said act, could be warned by reading the same that by going on strike he would be doing an unlawful thing. In Railway Company v. Dey (C. C.), 35 Fed. 866, 1 L. R. A. 744, the court said:

> "No penal law can be sustained unless its mandates are so clearly expressed that any ordinary person can determine in advance what he may or what he may not do under it."

In Tozer v. U. S. (C. C.), 52 Fed. 917, the court further said:

> "In order to constitute a crime the act must be one which the party is able to know in advance

> whether it is criminal or not. The criminality of an act can not depend upon whether a jury may think it reasonable or unreasonable. There must be some definiteness and certainty."

And in U. S. v. Brewer, 139 U. S. 278, on page 288, 11 Sup. Ct. 538, on page 541 (35 L. Ed. 190), the Supreme Court said:

> "Laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid. United States v. Sharp, Pet. C. C. 118. Before a man could be punished his case must be plainly and unmistakably within the statute. United States v. Lasher, 134 U. S. 624, 628."

In applying the rule stated in these cases we contend that in determining the proper construction and meaning of the clause in said act referred to, especially the words, "to limit the facilities for transporting," etc., it is difficult to ascertain whether this statute has been violated. The statute itself furnishes no assistance in the way of answering the question. It furnishes no means for the guidance of courts, juries, or defendants in determining when or how the statute has been violated, and certainly the clause of the act is too vague, indefinite and uncertain to satisfy the constitutional requirements or to constitute "due process of law."

In United States v. Cruikshank, 23 U. S. Supt. Ct. Rep. 593, the Supreme Court said:

> "In criminal cases prosecuted under the laws of the United States the accused has the constitu-

> tional right 'to be informed of the nature and cause of the accusation.' This was construed to mean 'with clearness and all necessary certainty to apprise the accused of the crime with which he stands charged'."

And in U. S. v. Cook, 17 Wall 174 (84 U. S. 539), that

> "every ingredient of which the offense is composed must be accurately and clearly alleged * * *. The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense and avail himself of his conviction or acquittal for protection against a further prosecution of the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction if one should be had."

The same rule is followed out in the following cases:

U. S. v. Reese, 92 U. S. 219, 23 L. Ed. 563;

McChord v. Louisville & N. R. R., 183 U. S. 498, 46 L. E. 296;

Cook v. State, 26 Ind. App. 489, 59 N. E. 489;

U. S. v. Witberger, 5 Wheat 95, 5 L. Ed. 42;

Cincinnati v. P. B. & S. R. R., 200 U. S. 179, 50 L. Ed. 428;

Shonee v. Anderson, 209 U. S. 434, 52 L. Ed. 875;

Gibbs v. Consolidated Gas Co., 130 U. S. 396, 32 L. Ed. 979;

Collins v. Kentucky, 234 U. S. 634, 58 L. Ed. 1510;

State v. Mann, 2 Ore. 238;

U. S. v. Capital Traction Co., 34 App. D. C. 592, 19 Ann. Cas. 68;

Brown v. State, 137 Wis. 543, 119 N. W. 338;

R. R. Comm. v. Grank Trunk R. R., 179 Ind. 235, 100 N. E. 852;

American School v. McAnnulty, 187 U. S. 94, 47 L. E. 90;

Chicago R. R. etc. v. Polt, 232 U. S. 165, 58 L. Ed. 554;

Chicago, etc. v. Dey, 35 Fed. 866;

Louisville R. R. v. Kty., 35 S. W. 129, 33 L. R. A. 209;

Gulf R. R. v. Ellis, 165 U. S. 150, 41 L. Ed. 666;

Hocking Valley R. R. v. U. S., 210 Fed. 735;

International Harvester Co. v. Kty., 58 L. Ed. 1484.

It is the function of the judiciary to determine whether or not a certain or particular act comes within a given prohibition, depending upon wrongful intent. In determining this the judiciary must look to the generic statutory provisions. If this statutory provision is of such generality, vagueness and uncertainty that its limits can not be defined, how then is the judiciary going to function? How can the judicial body determine whether such acts fall within the given prohibition? So vague and variant is the statute before us

that no one can tell what course of conduct to take except by subsequent action of the jury. Under a crime so indefinitely defined and in its definition an element of degree as to which estimates may differ and as to which people's opinions may differ, the result would be that a man might find himself in prison because his honest judgment did not anticipate what a jury of less competent men would. It compels men to guess what a jury of twelve might think; whether his judgment is better than theirs.

Our Supreme Court in a very recent opinion by Mr. Chief Justice White upon the constitutionality of the very statute before us, in United States of America v. Cohen Grocery Co., decided Feb. 28, 1921, reported in the U. S. Sup. Ct. Advance Opinions, No. 10, page 300, says:

> "The sole remaining inquiry, therefore, is the certainty or uncertainty of the text in question; that is, whether the words, 'That it is hereby made unlawful for any person wilfully * * * to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries,' constituted a fixing by Congress of an ascertainable standard of guilt, and are adequate to inform persons accused of violation thereof of the nature and cause of the accusation against them. That they are not, we are of opinion so clearly results from their mere statement as to render elaboration on the subject wholly unnecessary. Observe that the section forbids no specific or definite act. It confines the subject-matter of the investigation which it authorizes to no element essentially inhering in

the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee, and the result of which no one can foreshadow or adequately guard against. In fact, we see no reason to doubt the soundness of the observation of the court below in its opinion to the effect that, to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury. And that this is not a mere abstraction finds abundant demonstration in the cases now before us; since in the briefs in these cases the conflicting results which have arisen form the painstaking attempts of enlightened judges in seeking to carry out the statute in cases brought before them are vividly portrayed. As illustrative of this situation we append in the margin a statement from one of the briefs on the subject. And again, this condition would be additionally obvious if we stopped to recur to the persistent efforts which, the records disclose, were made by administrative officers, doubtless inserted by a zealous effort to discharge their duty, to establish a standard of their own to be used as a basis to render the section possible of execution.

"That it results from the consideration which we have stated that the section before us was void, for repugnancy to the Constitution, is not open to question. United States v. Reese, 92 U. S. 214, 219, 220, 23 L. Ed. 563, 565; United States v. Brewer, 139 U. S. 278, 288, 35 L. ed. 190, 193, 11

Sup. Ct. Rep. 538; Todd v. United States, 158 U. S. 278, 282, 39 L. Ed. 982, 983, 15 Sup. Ct. Rep. 887; and see United States v. Sharp, Pet. C. C. 118, Fed. Cas. No. 16, 264; Chicago & N. W. R. Co. v. Dey, 1 L. R. A. 744, 2 Inters. Com. Rep. 325, 35 Fed. 866; Tozer v. United States, 4 Inters. Com. Rep. 245, 52 Fed. 917, 919, 920; United States v. Capital Traction Co., 34 App. D. C. 592, 19 Ann. Cas. 68; United States v. Pennsylvania R. Co., 242 U. S. 208, 237, 238, 61 L. ed. 251, 267, 268, 37 Sup. Ct. Rep. 95."

In the case at bar the only distinction between it and the case just above cited is that in the case at bar the defendants are alleged to have conspired and agreed and arranged among themselves to limit the facilities of transportation. It has been held in a very recent case by our Supreme Court that where the element of conspiracy is involved it does not change the rule as laid down in the Cohen Grocery Co. v. U. S. case above cited. Mr. Chief Justice White upon that point says in Weeds, Inc., et al. v. United States of America, U. S. Sup. Ct. Advance Opinions No. 0, at page 310:

> "As the only difference between the charges in the L. Cohen Grocery Co. Case (..U. S..., ante, ..., ..Sup. Ct. Rep. ..), and those in this is the fact that here, in one of the counts, there was a charge of conspiracy to exact excessive prices, it follows that the ruling in the Cohen case is decisive here unless the provision as to conspiracy to exact excessive prices is sufficiently specific to create a standard, and to inform the accused of the accusa-

> tion against him, and thus make it not amenable to the ruling in the Cohen case. But, as we are of the opinion that there is no ground for such distinction, but, on the contrary, that the charge as to conspiracy to exact excessive prices is equally wanting in standard, and equally as vague as the provision as to unjust and unreasonable rates and charges dealt with in the Cohen case, it follows, for reasons stated in that case, that the judgment in this must be reversed and the case remanded, with directions to set aside the sentence and quash the indictment."

We respectfully submit that the clause of said act "to limit the facilities for transporting necessaries" is equally as vague, indefinite and uncertain as the statute which was declared unconstitutional in the case of Cohen Grocer Co. v. U. S. above referred to.

B.

It is obvious that the Lever Act contains an arbitrary classification by Congress and repugnant to the "due process" clause of the Fifth Amendment. The power to make an arbitrary classification is arbitrary power and arbitrary power has no place in our system of government. The act exempts the farmer, gardener, horticulturist and other people engaged in the cultivating of lands and the raising of crops from the application of the act. In McGehee on Due Process of Law, page 60, says, "Purely arbitrary decrees or enactments of legislature directed aaginst individuals or

classes are held not to be 'the law of the land,' or to conform to "due process of law'."

And Willoughby on the Constitution, pp. 873, 874, says:

> "The United States is not by the Constitution expressly forbidden to deny to any one the equal protection of the laws, as are the states by the first section of the Fourtenth Amendment. It would seem, however, that the broad interpretation which the prohibition as to 'due process of law' has received is sufficient to cover very many of the acts which, if committed by the states, might be attacked as denying equal protection. Thus it has been repeatedly declared that enactments of a legislature, directed against particular individuals or corporations, or classes of such, without any reasonable ground for selecting them out of the general mass of individuals of corporations, amounts to a denial of due process of law so far as their life, liberty or property is affected. One of the requirements of due process of law, as stated by the Supreme Court, is that the laws 'operate on all alike,' and do not subject the individual to an arbitrary exercise of the powers of government."

We contend that the classification as attempted in said act is unreasonable and arbitrary.

> "It must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any

such basis. Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 560, 22 Sup. Ct. 431, 439 (46 L. Ed. 679); Gulf, etc. Ry. Co. v. Ellis, 165 U. S. 150, 165, 17 Sup. Ct. 255, 41 L. Ed. 666."

In the Connolly case the court was dealing with the Anti-Trust Act of Illinois (Laws 1893, p. 182), condemning trusts or combinations or conspiracies to limit production, prevent competition, and fix prices. Section 9 of the act provided:

> "The provisions of this act shall not apply to agricultural products or live stock while in the hands of the producer or raiser."

In holding the classification to be arbitrary the court said:

> "We have seen that under the statute all except producers of agricultural commodities and raisers of live stock, who combine their capital, skill, or acts for any of the purposes named in the act, may be punished as criminals, while agriculturists and live stock raisers, in respect of their products or live stock in hand, are exempted from the operation of the statute, and may combine and do that which, if done by others, would be a crime against the state The statute so provides notwithstanding persons engaged in trade or in the sale of merchandise and commodities, within the limits of a state, and agriculturists and raisers of live stock, are all in the same general class; that is, they are all alike engaged in domestic trade, which is, of right, open to all, subject to such regulations, applicable alike to all in like conditions, as the state may legally prescribe."

Following the rule as laid down in the Connolly case, *supra,* we find that the Lever Act is entitled "An act to provide further for the national security and defense by encouraging the production, conserving the supply and controlling the distribution of food products and fuel." Under this act foods, feeds and fuel are called necessaries, and the prohibitions are as to necessaries thus defined. Farmers, gardeners, ranchmen and many others engaged in like pursuits or people who produce foods and feeds are exempted by the act. Those exempted may knowingly commit waste or wilfully permit preventable deterioration of such foods and feeds in or in connection with their production, manufacture or distribution, may hoard such products, may monopolize or attempt to monopolize such products, may engage in any discriminatory and unfair, or any deceptive or wasteful practice or device, or may make any unjust or unreasonable rate or charge in handling or dealing in or with such products, and may conspire, combine, agree, or arrange with any other person to limit the facilities for producing or to restrict the supply or to restrict the distribution or to prevent, limit or lessen the production, to enhance the price, or exact excessive prices for such products, while all other persons are to be punished as criminals for doing the same acts. As in the case at bar, because the defendants, after the cessation of hostilities, exercised their constitutional right to strike, they are arrested, convicted and sentenced for doing no more than those mentioned as exempted are allowed to do under the same act.

It is also provided in said act that "nothing in this act shall be construed to forbid or make unlawful collective bargaining by any co-operative association, or other association, of farmers, dairymen, gardeners or other producers of farm products, with respect to the farm products produced or raised by its members upon land owned, leased or cultivated by them." Is as unwarranted as the clause just considered, and certainly the classification is arbitrary and not natural or reasonable, and is repugnant to the due process clause of the Fifth Amendment, and therefore void.

In Brown v. Jacobs Pharmacy Co., 41 S. E. 563, 90 Am. St. Rep. 150, 115 Ga. 453, which was a case determined by the Supreme Court of Georgia, that Supreme Court held:

> "The defendants in the court below attacked the constitutionality of this act" (Anti-Trust Act) "and one of the executions to the judgment is that the court erred in holding it to be constitutional. Since this case was heard and determined in the lower court and argued here the Supreme Court of the United States, in a decision rendered March 10, 1902, in the case of Connolly v. Pipe Company, 22 Sup. Ct. 431, 46 L. ed .., held the anti-trust statute of Illinois, which contained a provision that it should *'not apply to agricultural products or live stock in the hands of the producer or raiser'* (italics are ours) to be repugnant to the provisions of the Fourteenth Amendment of the Constitution of the United States because it denied the equal protection of the laws of that state to those within

its jurisdiction who were not producers of agricultural products or raisers of live stock. The Anti-Trust Act of this state above reefrred to, exempts from its operation 'agricultural products or live stock while in the possession of the producer or raiser.' Consequently, under the decision of the Supreme Court of the United States, we are constrained to hold that this exemption renders the act unconstitutional."

The same principle was held in the case of State v. Cudahy Packing Co. et al., 82 Pac. Rep. 833, by the Supreme Court of Montana.

In In re Grice, 79 Fed. 627, it is held that

"by 'equal protection of the laws' as used in the Fourteenth Amendment to the Constitution of the United States, is meant equal security under them to every one under similar terms, in his life, liberty, property and in the pursuit of happiness."

"A state statute, prohibiting all combinations in restriction of competition or trade, which exempts from its provisions '*agricultural products or live stock while in the hands of the producer or raiser*' (italics are ours) (the Texas anti-trust law of 1889), is class legislation and violates that part of the Fourteneth Amendment to the Constitution of the United States which declares that no state shall deny to any person within its jurisdiction the equal protection of the laws. And the fact that the persons thus exempted are not in a position to combine does not remove the objection to the discrimination in their favor."

While the cases referred to are under the Fourteenth Amendment of the Constitution, they come equally under the "due process of law" principle as announced under the Fifth Amendment of the Constitution. The limitation of the Fourteenth Amendment is "without due process of law." In the Foutreenth Amendment this limitation is accompanied with a prohibition of the denial of the equal protection of the laws. The latter expression is broader than the former. It must be conceded that a mere denial of the "equal protection of the laws" would necessarily became a part of the "due process of law" principle under the Fifth Amendment and binding upon Congress.

C.

Indeed, it has been seriously questioned whether Congress had the right under its powers to enact such a law, and that the act is outside the limitations of the Constitution of the United States. It is provided by Art. I, Sec. 8, Par. 18 of the Constitution that Congress shall have power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers." It is a matter of history that no other power of government was more contested than were these. The provisions were retained after critical and careful consideration with full understanding of their significance and were finally approved as necessary for the security and preservation of the nation.

There is a widely prevalent opinion that in time of war the Constitution and the laws whih govern in time

of peace are not to be observed, which includes the view that Congress is justified in assuming power not conferred on it by the Constitution. This conception of war powers is erroneous. The war power of Congress is a constitutional power; it is not a power outside the Constitution or above it. It is within the Constitution, a part of it. There is no necessity for Congress to exceed its war powers, as even war does not suspend the operation of the Constitution. This principle is recognized in *ex parte* Milligan, 4 Wall, page 2, 121 U. S. 127, 18 L. Ed. 281, and also recognized in the late decisions in the case involving the very statute before us for consideration.

In the case of United States v. Cohen Grocery Co., U. S. Sup. Ct. Advance Opinions No. 10, page 301, it was stated:

> "We are of the opinion that the court below was clearly right in ruling that the decisions of this court indisputably establish that the mere existence of a state of war could not suspend or change the operation upon the power of Congress of the guaranties and limitations of the Fifth and Sixth Amendments as to questions such as we are here passing upon." Citing *Ex parte* Milligan, 4 Wall. 2, 121-127, 18 L. ed. 281, 295-297; Monongahela Nav. Co. v. United States, 148 U. S. 312, 336, 37 L. ed. 463, 471, 13 Sup. Ct. Rep. 622; United States v. Joint Traffic Asso., 171 U. S. 505, 571, 43 L. ed. 259, 288, 19 Sup. Ct. Rep. 25; McCray v. United States, 195 U. S. 27, 61, 49 L. ed. 78, 97, 24 Sup. Ct. 769, 1 Ann. Cas. 561; United States v.

Cress, 243 U. S. 316, 326, 61 L. ed. 746, 752, 37 Sup. Ct. Rep. 380; Hamilton v. Kentucky Distilleries & Warehouse Co., 251 U. S. 146, 156, 64 L. ed. 194, 199, 40 Sup. Ct. Rep. 106.

The case at bar does not fall within the so-called "rule of reason" as laid down in the case of United States v. Nash, 229 U. S. 373, 57 L. ed. 1232. The logic of the Nash case is that if the accused departs from what is usual and customary he does so at the risk of what a court and jury may determine to be unjust and unreasonable, and a vague statute will be upheld where the subject matter will not permit the statute itself to be inflexible. Such is not the case with the subject matter of this case, and in Mr. Chief Justice Clarke's opinion in the Cohen Grocery Co. case, cited above, the court says:

> "But decided cases are referred to which, it is insisted, sustain the contrary view. Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 53 L. ed. 471, 29 Sup. Ct. Rep. 220; Nash v. United States, 229 U. S. 373, 57 L. ed. 1232, 33 Sup. Ct. Rep. 780; Fix v. Washington, 236 U. S. 273, 59 L. ed. 573, 35 Sup. Ct. Rep. 383; Miller v. Strahl, 239 U. S. 426, 60 L. ed. 364, 36 Sup. Ct. Rep. 147; Omaechevarria v. Idaho, 246 U. S. 343, 62 L. ed. 763, 38 Sup. Ct. Rep. 323. We need not stop to review them, however, first, because their inappositeness is necessarily demonstrated when it is observed that, if the contention as to their effect were true, it would result, in view of the text of the statute, that no standard whatever was required, no information

as to the nature and cause of the accusation was essential, and that it was competent to delegate legislative power, in the very teeth of the settled significance of the Fifth and Sixth Amendments and of their plainly applicable provisions of the Constitution; and second, because the cases relied upon all rested upon the conclusion that, for reasons found to result either from the text of the statutes involved or the subjects with which they dealt, a standard of some sort was afforded. Indeed, the distinction between the cases relied upon and those establishing the general principle to which we have referred, and which we now apply and uphold as a matter of reason and authority, is so clearly pointed out in decided cases that we deem it only necessary to cite them. International Harvester Co. v. Kentucky, 234 U. S. 216, 221, 58 L. ed. 1284, 1287, 34 Sup. Ct. Rep. 853; Collins v. Kentucky, 234 U. S. 634, 637, 58 L. ed. 1510, 1511, 34 Sup Ct. Rep. 924; American Seeding Machine Co. v. Kentucky, 236 U. S. 660, 662, 59 L. ed. 773, 35 Sup. Ct. Rep. 456; and see United States v. Pennsylvania R. Co., *supra*."

In the case of United States v. Cohen Grocery Co., *supra*, the Supreme Court held that "Congress, in attempting, as it did in the Lever Act of Aug. 10, 1917, Par. 4 as re-enacted in the act of October 22, 1919, Par. 2, to punish criminally any person who wilfully makes 'any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries' violates United States Constitution, Fifth and Sixth Amendments, which require an ascertainable standard of guilt, fixed

by Congress rather than by courts and juries, and secure to accused persons the right to be inforced of the nature and cause of accusations against them."

The same principle must be applied to the clause of the said act, viz., to limit the facilities for transporting, etc.

In Connolly v. Union Sewer Pipe Co., 184 U. S. 564, the court held that

> "The principles applicable to such a question are well settled by the adjudications of this court. If different sections of a statute are independent of each other, that which is unconstitutional may be disregarded, and valid sections may stand and be enforced. But if an obnoxious section is of such import that the other sections without it would cause results not contemplated or desired by the legislature, then the entire statute must be held to be inoperative. The first section of the act here in question embraces by its terms all persons, firms, corporations, or associations of persons who combine their capital, skill, or acts for any of the purposes specified, while the ninth section declares that the statute shall not apply to agriculturalists or live-stock dealers in respect of their products or stock in hand. If the latter section be eliminated as unconstitutional, then the act, if it stands, will apply to agriculturists and live-stock dealers. Those classes would in that way be reached and fined, when, evidently, the legislature intended that they should not be regarded as offending against the law even if they did combine their capital, skill, or acts in respect to their products

or stock in hand. Looking, then, at all the sections together, we must hold that the legislature would not have entered upon or continued the policy indicated by the statute unless agriculturalists and live-stock dealers were excluded from its operation, and thereby protected from prosecution. The result is that the statute must be regarded as an entirety, and in that view it must be adjudged to be unconstitutional as denying the equal protection of the laws to those within its jurisdiction who are not embraced by the ninth section. Whether it is also within the prohibition against the deprivation of property without due process of law is a question which is unnecessary to consider at this time."

The same rule was followed in:

Muskrat v. United States, 55 U. S. Sup. Ct. Rep. 345;

Union Co. Nat. Bank v. Ozan Lumber Co., 127 Fed. 22.

For the foregoing reasons we respectfully urge that the errors occurring at the trial should be corrected by this Honorable Court and that the verdict of the jury in this case be set aside.

Respectfully submitted,

DAVIS, RUSH & MACDONALD,

ALLISON & DICKSON.